# No. 16,190

# United States Court of Appeals

## For the Ninth Circuit

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MRS. GRACE CARRIGAN,
*Appellant,*

vs.

SUNLAND-TUJUNGA TELEPHONE COMPANY, and STATE OF CALIFORNIA PUBLIC UTILITIES COMMISSION,
*Appellees.*

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## BRIEF OF APPELLEE SUNLAND-TUJUNGA TELEPHONE COMPANY.

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## Subject Index

## Table of Authorities Cited

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### STATEMENT OF THE CASE.

This case comes before this Court on appellant's appeal from orders of the United States District Court for the Southern District of California dismissing her complaint against appellees, Sunland-Tujunga Telephone Company (the "Company") and the Public Utilities Commission of the State of California (the "Commission"), on the ground that the complaint fails to state a claim upon which relief can be granted. Tr. 115, 117.

Appellant alleges in her complaint (Tr. 2) that the Company's charges for telephone services are unlaw-

ful even though they are based on the three rate schedules promulgated by the Commission. The first schedule, called "A-1," is for calls to certain prefixes in the Los Angeles Extended Area comparatively close to the subscriber's prefix. Such calls are billed on a flat rate basis. The second schedule is called "H-1" and is for calls to more distant prefixes within the Los Angeles Extended Area. They are what is commonly known as "message unit" calls. Such calls are billed on a fluctuating toll basis, depending upon the distance of the prefix called from the subscriber's prefix and the length of time of the call. Some calls under the H-1 rate cost more than twenty-four cents; some cost less, depending upon the distance and length of time of the call. Finally, there is the "B-1" schedule for long distance calls outside the Los Angeles Extended Area. The charge for such calls varies with the distance of the call and the length of time of the call, but is always in excess of twenty-four cents per call.

Appellant asserts in her complaint (Tr. 2) that when she was a subscriber of the Company it charged her less than twenty-five cents per call for a number of message unit (H-1) calls and that such charges were in violation of sections 4251-4254 of the Internal Revenue Code. She claims that, although the charges made by the Company were in conformance with the Commission's tariffs, all such message unit calls of less than twenty-five cents should have been included within the flat rate charge for A-1 calls. She further alleges that she refused to pay what she

deemed to be the unlawful part of her telephone charges and that because of such refusal to pay, her telephone was disconnected by the Company.

Appellant prays for specific relief against both appellees to require certain changes in the tariffs under which the Company operates and to require the restoration of her telephone service. She prays also for an injunction against both appellees to prevent them from enforcing the present tariff schedules promulgated by the Commission. Although she seeks to recover $15,000 damages from the Company and $30,000 in damages from the Commission, she does not allege facts showing any real monetary damages.

Both appellees moved to dismiss the action on the grounds that the District Court had no jurisdiction over the subject-matter of the complaint and that the complaint failed to state a claim. Tr. 27, 35. The court granted the motions on the latter ground. Tr. 95.

After the court had ordered the action dismissed (Tr. 95), but prior to the execution of formal orders dismissing the action, appellant filed with the District Court and served upon appellees an application for a hearing before a three-judge court. Tr. 107. Thereafter the formal orders of dismissal were filed. Tr. 115, 117.

## ARGUMENT.

### THE DISTRICT COURT WAS CORRECT IN ITS CONCLUSION THAT PLAINTIFF'S COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

Appellant's claim that the rates approved by the Commission and charged by the Company were unlawful is founded upon sections 4251-4254 of the Internal Revenue Code, which establish an excise tax on telephone service to be paid by the telephone subscriber. The tax is broken down between "local" service and "long distance service," although it is at the rate of 10 percent for each type of service. "Long distance" service is defined in the code as being a message or conversation for which a toll charge of more than twenty-four cents is paid. "Local" service is defined as telephone service not within the definition of "long distance" service; in other words, service paid for on a flat rate basis and/or for which a toll charge of twenty-four cents or less is paid.

Appellant contends that under the above provisions of the Internal Revenue Code, the Company, although operating under tariffs approved by the California Public Utilities Commission (see 56 Cal. P.U.C. 80), cannot charge twenty-four cents or less for any message unit (H-1) call. She says that all such calls are covered by the A-1 schedule flat rate. The message unit (H-1) calls for which the charge is more than twenty-four cents are deemed long distance (B-1) calls by appellant. Apparently she has no objection to such charges.

Thus, it seems to be appellant's position that, although the Internal Revenue Code is not specifically

concerned with telephone rate regulation, it by inference prohibits state public utility commissions from authorizing any toll charges of less than twenty-five cents for a particular call, at least where the subscriber is billed a flat charge for some nearby calls. If appellant is wrong her complaint cannot state a claim. Appellant's position is not only wrong; it lacks even a shred of support in logic, in rules of statutory construction, or in case law.

It should be made clear at the beginning that this case does not involve an erroneous tax unless the rates charged by this appellee, apart from the taxes included, were unlawful. The tax for both "local" and "long distance" calls is the same, *i.e.,* ten percent. Hence, if the charges for service were correct and lawful, the tax charged was necessarily correct.

The question presented, therefore, is simply whether the Internal Revenue Code not only establishes a tax on telephone calls, but whether it also limits state public utilities commissions in establishing tariff schedules for telephone companies for intrastate calls. More specifically the question is whether the Internal Revenue Code prohibits this appellee from charging a flat rate for some short distance calls and a fluctuating rate of twenty-four cents or less for certain more distant calls, where the California Public Utilities Commission has approved such method of computing charges.

For Congress to have imposed such a limitation on the intrastate rate-making powers of state public utilities commissions would have been an unusual de-

parture from past practice and would be completely contrary to the entire scheme of regulation that Congress has established. See 47 U.S.C. §§152(b)(1), 153(e), 153(h), 221(b). For Congress to have legislated with respect to rate regulation in the Internal Revenue Code would be a legal oddity. For Congress to have done so by implication, where it could easily have expressed such an intention in clear and precise language, is scarcely conceivable. However, even if such objections be overlooked, appellant's claim completely breaks down for there is simply no such implication in the Code. Nothing in the sections cited by appellant in her complaint remotely indicates that only calls for which the charge is in excess of twenty-four cents may be billed on a fluctuating rate basis and all other calls must be billed only on a flat rate basis. In fact, the regulations under the 1939 Code (new regulations have not yet been issued) clearly contemplate combined flat and fluctuating rates for local calls. Reg. 42, Sec. 130.41(b).

Moreover, Sections 4251 and 4252 of the Internal Revenue Code were amended by the Excise Tax Technical Changes Act of 1958, P. L. 85-859, 72 Stat. 1275, enacted by the most recent Congress. The new law does not differentiate between "local" and "long distance" calls, but, instead, breaks the tax down between "general" and "toll" calls. The distinction between toll calls of twenty-four cents and less and other toll calls has been eliminated; all toll calls, including toll calls of twenty-four cents and less and toll calls in excess of twenty-four cents, are included within the

term "toll" calls. The tax on both types of calls remains at ten percent.

It would seem that appellant would not contend that the rate schedules assailed in her complaint are invalid under the new law. It is true that the alleged wrongful acts of which appellant complains occurred before the enactment of the new law, which does not become operative until January 1, 1959. However, the new law is useful in interpreting the sections upon which appellant relies. It is to be supposed that if these sections formerly regulated telephone rates, Congress would not have eliminated such regulatory provisions without at least noting that fact in the extensive reports accompanying the legislation that affected the amendment. It is therefore most significant that Senate Report No. 2090, which explained the legislation, did not indicate that it made any change in telephone rate regulation. 1958 U.S. Code Cong. and Ad. News, pp. 6011-6013. The reason seems obvious: the Internal Revenue Code even before the amendments did not include any telephone rate regulations.

In essence, the Code, as it formerly read and as it is amended, says no more than that there shall be a tax of ten percent on the charges for all telephone calls, whether they be local or long distance, toll or general. What those base charges may be or how they may be computed it does not say. Here a tax of ten percent was billed—no more, no less. Therefore, appellant's claim that the Internal Revenue Code was violated is groundless. She has failed to state a claim upon which relief may be granted.

THE DISMISSAL OF APPELLANT'S ACTION MAY ALSO BE SUPPORTED ON THE GROUND THAT THE DISTRICT COURT HAD NO JURISDICTION OVER THE SUBJECT MATTER OF THE COMPLAINT.

It is obvious that appellant cannot obtain jurisdiction in the federal courts under 28 U.S.C. §1331, relating to federal questions generally, because she has not sufficiently alleged that the matter in controversy exceeds the value of $3,000, as required by that section at the time the action was commenced. *McNutt v. General Motors Accept. Corp.* (1936), 298 U.S. 178. Moreover, as shown in the preceding section, appellant's claim is so plainly without merit that there is no *substantial* federal question involved. It is, of course, well settled law that under such circumstances there is no federal jurisdiction. See 54 Am. Jur., United States Courts, §46.

Appellant seeks to avoid the necessity of alleging jurisdictional amount by asserting that her claim arises under "an Act of Congress providing for internal revenue" and that therefore there is jurisdiction under 28 U.S.C. §1340, which has no requirement with respect to jurisdictional amount. It would seem, however, that this section would be limited to suits by or against the Federal Government. In any event, the question presented lacks the necessary substantiality.

Finally, it should be noted that if any question were actually presented under the Federal Constitution, jurisdiction would be absent under 28 U.S.C. §1342, which provides:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with,

any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

"(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and

"(2) The order does not interfere with interstate commerce; and

"(3) The order has been made after reasonable notice and hearing; and,

"(4) A plain, speedy and efficient remedy may be had in the courts of such State."

The H-1 schedule of which appellant complains clearly does not interfere with interstate commerce; it applies only to the Los Angeles Extended Area. In the absence of allegations to the contrary it must, of course, be assumed that the tariff order complained of was made after reasonable notice and hearing. If plaintiff has suffered a legal injury, there is a plain, speedy and efficient remedy in state courts. Appellant has not alleged the contrary.

It follows that the district court had no jurisdiction over the subject-matter of the complaint.

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**THE DISTRICT COURT JUDGE WAS AUTHORIZED TO DISMISS THE ACTION WITHOUT CONVENING A THREE-JUDGE COURT.**

Appellant contends that her complaint could not validly be dismissed by a single district court judge,

as it was, but that, instead, only a three-judge court could dismiss it. Appellant did not assert her alleged right to a hearing before a three-judge court until this case had been decided, but even if she had made a timely motion, she would not have been entitled to have a three-judge court convened.

Section 2281 of Title 28 of the United States Code, upon which appellant relies, provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statute, shall not be granted by any district court or judge thereof upon the ground of unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

This statute can have no application against this appellee, Sunland-Tujunga Telephone Company, because by its terms it applies only to actions against state officers. It does not have any effect as to private parties.

Moreover, it says that certain injunctions "shall not be *granted*" by a district court judge without a hearing by a three-judge court. It says nothing about *dismissals* of actions seeking such injunctions. It is true that section 2284(5) of Title 28 states that a single judge shall not dismiss the action, but this has reference only to the time after a three-judge court

has been convened. As the court stated in *Jacobs v. Tawes* (4th Cir., 1957), 250 F. 2d 611, 614:

> "Subsection 5 [of section 2284] was manifestly intended to regulate procedure after the court of three judges had been constituted, not to abrogate the statutory rule that the judge before whom the action was brought may dismiss it if the complaint does not state a case within the jurisdiction of the District Court."

Numerous decisions have upheld the right of a single district court judge to dismiss an action of the type included in section 2281 where it is without substance. *Jacobs v. Tawes, supra,* is one of the most recent. There the court summarized the law in this regard:

> "Appellant contends, however, that the District Judge was without jurisdiction to dismiss the case, arguing that, since a court of three judges was required for the hearing of the application for injunction, a single judge had no jurisdiction to take any action in the case and, because of the provisions of 28 U.S.C. §2284(5), might not dismiss it, even though no claim for relief cognizable in a federal court was stated in the complaint. We think that this contention is entirely without merit. The court of three judges is not a different court from the District Court, but is the District Court composed of two additional judges sitting with the single District Judge before whom the application for injunction has been made. 28 U.S.C. §2284(1). The purpose of the requirement of three judges for the hearing of such a case is to prevent the improvident invalidation of state legislation by action of a single judge. Phillips v.

United States, 312 U.S. 246, 248-251, 61 S.Ct. 480, 85 L. Ed. 800. The presence of the two additional judges is not required where no substantial question as to the validity of the state legislation is involved. Ex parte Poresky, 290 U.S. 30, 54 S. Ct. 3, 4, 78 L. Ed. 152; Davis v. County School Board of Prince Edward County, D.C., 142 F. Supp. 616. The same is held where no basis for injunctive relief is asserted. Linehan v. Waterfront Commission of New York Harbor, D. C., 116 F. Supp. 401 (a case decided after the enactment of 28 U.S.C. §2284). A fortiori, it is not required that the additional judges be summoned, when, as here, it appears from the complaint itself that the case is not one within the jurisdiction of the court. Such a case is manifestly not one 'required by Act of Congress to be heard and determined by a district court of three judges' within the language of 28 U.S.C. §2284. As said in Ex parte Poresky, supra, '* * * the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction.' " (p. 614)

Here appellant's complaint neither states a claim nor shows jurisdiction. It therefore follows that the district court had authority to dismiss the case without convening a three-judge court.

Furthermore, if the complaint were to state a cause of action it would not be grounded upon any possible unconstitutionality of the Public Utility Commission tariffs under which this appellee operates, but simply upon the terms of the Internal Revenue Code. Although in a sense whenever a state law or order is

assailed on the ground that it violates a federal statute the Supremacy Clause is involved, it is well settled that there is no necessity in such cases to convene a three-judge court. This point was made in *Pennsylvania Greyhound Lines v. Board of P. U. Commissioners* (D.C.N.J., 1952), 107 F.Supp. 521, 525, where the court reviewed the leading decisions as follows:

> "In deciding whether a suit for an injunction to restrain a state official upon the grounds of unconstitutionality of a state statute requires a three judge court, the United States Supreme Court has noted that two types of objections to state statutes have been made, both of which have their source in the United States Constitution. The substance of objections of the first type is the allegation that a state statute violates directly some constitutional provision. When an injunction is sought on that basis, a three judge court is necessary, Query v. United States, 316 U.S. 486, 62 S. Ct. 1122, 86 L. Ed. 1616. The substance of objections of the second type is the allegation that the supremacy clause of the Constitution has rendered inoperative a state law which would be valid had not Congress chosen to legislate. Cases of this nature have been considered primarily ones involving interpretation of a federal statute and not constitutional cases within the meaning of §2281. Consequently, a suit for an injunction against a state official in such circumstances need not be heard before a three judge court. Ex parte Bransford, 310 U.S. 354, 60 S. Ct. 947, 84 L. Ed. 1249.
>
> "A fairly recent application of this classification of injunction suits is Case v. Bowles, 327 U.S. 92, 66 S. Ct. 438, 90 L. Ed. 552. The State

of Washington sold some of its school-land timber in a manner prescribed by its constitution and statutes. The United States Price Administrator sued in the federal district court to enjoin the State Commissioner of Public Lands from completing the sale, asserting that its consummation would constitute a violation of the Emergency Price Control Act and applicable regulations. Answering the State's contention that the case should have been tried by a three judge court, the Supreme Court stated:

> '* * * But here the complaint did not challenge the constitutionality of the State statute but alleged merely that its enforcement would violate the Emergency Price Control Act * * *' 327 U.S. 92, 97, 66 S.Ct. 438, 441."

In addition to the cases cited therein, see *Bradley v. Waterfront Com'n of New York Harbor* (D.C.S.D. N.Y. 1955), 130 F. Supp. 303, 311.

Since the complaint fails both to state a claim and to show jurisdiction, and moreover raises no constitutional question, it must follow that the district court acted within its powers and authority in dismissing the action without convening a three-judge court.

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## CONCLUSION.

Appellant's complaint fails to state a claim because the Internal Revenue Code obviously does not regulate telephone rate charges. It fails to show jurisdiction because it is apparent that no substantial federal question is presented and it does not allege

the necessary amount in controversy. Moreover, appellant's attempt to bring this action under 28 U.S.C. §1340 should also be denied because that section was never intended to cover litigation between private parties. The complaint was therefore properly dismissed because it fails to state a claim and does not show jurisdiction.

Such dismissal need not be made by a three-judge court. It is well settled that a district court judge alone may dismiss an action where the complaint fails to state a substantial claim, or where it fails to show jurisdiction, or where it is based upon a federal statute, rather than being based directly upon the Constitution. Each of those elements is present here. Moreover, this appellee is not a state officer or regulatory body and hence the three judge provisions are inapplicable to it.

It is therefore respectfully requested that the decision of the District Court be affirmed.

Dated, November 19, 1958.

Respectfully submitted,

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